

# **Who Owns What When Publishing in the Classroom?**

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## **Introduction**

In the State of Utah teachers are becoming required to post class assignments and materials on the Internet for student and parental access. If a teacher having posted information on the net moves to another school, or even out of state, who owns those materials?

In posting materials on the web a teacher uses information and graphics from other sources, what is legal to use and still claim ownership by the teacher? Where does the line exist for educators in posting materials on the net without copyright infringement and who is liable if infringement does occur?

## **Rules in Flux**

Copyright laws and regulations are not set in stone and therefore are subject to interpretation and change. This makes dealing with the questions of ownership very complicated. In addition, rules for materials used for profit differ from the rules used for education. If these two fields never crossed or mixed the problem of determining ownership would be much easier but with the increasingly common use and availability of multi-media in the classroom and on the Web the lines become quite fuzzy.

Part of the problem lies with the ability for the copyright laws to keep up with changing technology. Most of what is termed “analog” materials, printed works etc. have definite rules regarding their use, but digital works have thrown a wrench into the system.

## **Fair Use for Teachers**

This is far from being a settled issue. The boundaries here are constantly being disputed and the penalties for infringement are quite harsh. The first place to go for a teacher is the school or district policies regarding copyright material. If you are under the guidelines of your school or district you will be *less* liable for any infringement. The liability for infringement can run \$100,000.00 plus attorney fees and will be the responsibility of the individual and not the school or district though their policies may also be lacking and therefore also included in any lawsuit.

With so much at stake many would say “why bother?” and not attempt to use materials not specifically created by them. True, it is much safer, but it is also reinventing the wheel and very time consuming if the materials are there for the teacher to use.

There are some guidelines to follow and even these guidelines are disputable but they are the best available from the [Conference on Fair Use \("CONFU"\)](#).

Follow these general rules of thumb to decide whether you need permission to use a copyrighted work in the classroom (face to face) or distance learning (synchronous video instruction)

### Face-to-Face Instruction

1. Incorporate performances of others' works sparingly and only if a faculty member or the institution possesses a legal copy of the work.
2. Include any copyright notice on the original and appropriate citations and attributions to the source.
3. Limit access to students enrolled in the class and administrative staff as needed. Terminate access at the end of the class term.
4. Obtain permission for materials that will be used repeatedly by the same instructor for the same class.

### For Digital Instruction

For the purpose of these rules of thumb keep in mind that the rules are for teacher generated works using other sources and not simply copied and distributed.

1. Students, faculty and staff may incorporate others' works into a multimedia work or display and perform a multimedia work in connection with or creation of class assignments, curriculum materials, remote instruction, examinations, student portfolios or professional symposia.
2. Be conservative. Use only small amounts of other's works.
3. Don't make any unnecessary copies of the work.

### Fair Use Test

Following the rules of thumb will still leave you with questions. [The 4 Factor Fair Use Test](#) will help in making your decisions of what you can use and what you cannot.

Read each question and the comments about it. Answer each question about your use. See how the balance tips with each answer. Make a judgment about the final balance: overall does the balance tip in favor of fair use or in favor of getting permission?

**FACTOR 1:** What is the character of the use?

Nonprofit	Criticism	Commercial
Educational Personal	Commentary News reporting Parody Otherwise "transformative" use	Earn a Profit

Uses on the left tend to tip the balance in favor of fair use. The use on the right tends to tip the balance in favor of the copyright owner – in favor of seeking permission. The uses in the middle, if they apply, are very beneficial: they add weight to the tipping force of uses on the left; they subtract weight from the tipping force of a use on the right.

**FACTOR 2:** What is the nature of the work to be used?

Fact Published	A mixture of fact and imaginative	Imaginative Unpublished
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Again, uses on the left tip the balance in favor of fair use. Uses on the right tip the balance in favor of seeking permission. But here, uses in the middle tend to have little effect on the balance.

**FACTOR 3:** How much of the work will you use?

Small amount	More than a small amount
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This factor has its own peculiarities. The general rule holds true, uses on the left tip the balance in favor of fair use. Uses on the right tip the balance in favor of asking for permission, but if the first factor weighed in favor of fair use, you can use more of a work than if it weighed in favor of seeking permission. A nonprofit use of a whole work will weigh somewhat against fair use. A commercial use of a whole work would weigh significantly against fair use.

Where is your balance tipping after you have assessed the first three factors? The answer to this question will be important in the analysis of the fourth factor!

**FACTOR 4:** If this kind of use were widespread, what effect would it have on the market for the original or for permissions?

After evaluation of the first three factors, the proposed use is tipping towards fair use	The original is out of print or otherwise unavailable. No ready market for permission. Copyright owner is unidentifiable.	Competes with (takes away sales from) the original Avoids payment for permission (royalties) in an established permissions market
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This factor is a chameleon. Under some circumstances, it weighs more than all the others put together. Under other circumstances, it weighs nothing! It depends on what happened with the first three factors.

This last question is cyclical, how does a teacher know that use of the material will result in the loss of royalties etc. for the owner until it is in use? If it is in use and permission has not been granted the teacher is open for a lawsuit.

Consider the balance of the first three questions, if the balance is toward fair use then the teacher is probably in a safe area. If the balance leans toward getting permission there is no fair use. GET PERMISSION.

### **Ownership of Materials Generated at Work (School)**

Copyright law includes a section called Work For Hire in which the creator is not necessarily the owner of the work.

The author's employer owns work(s) when created by an employee within the scope of employment, or that fall within one or more of the ten statutory categories, where the agreement commissioning the work is documented in writing and signed by the author before work begins.

The ten statutory categories include: contribution to a collective work; part of a movie or other audiovisual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; an atlas; or a sound recording

If a work does not fit within the statutory definition of a work-for-hire, the employer may still own it if it is created pursuant to a contract with an assignment of copyright.

An author-owner is free to assign copyright to anyone, so a written contract can change these basic rules.

What does all this legal jargon mean for the educator? In the educational field the author is the owner unless there has been a signed contract stating otherwise. In some cases resources put forth by the school or institution may be a significant amount. The school or institution may try to recover some of those resources if the work becomes commercial. Generally a contractual agreement is reached between the author and the institution in order to protect both the author's copyright and the institutions investment.

### **Multiple Contributors**

Obviously the more people involved the more complicated the issues are in determining the ownership or partial ownership of materials. There are 2 factors that help in determining joint authorship of work.

1. Each contributor must have [copyrightable expression](#) AND
2. Intend at the time the work is created that all contributors have joint ownership in the finished work.

## Summary

The deeper a person delves into the copyright issues the more confusing the process becomes. Even experts and their lawyers are at odds with each other over exactly what constitutes fair use and ownership. A big part of the problem lies with the interpretation of the rules and regulations. Some judges interpret in one way and another will contradict the first judgment. After 2 years a group of experts still does not have a definite answer for many of these questions.

One benefit caused, in part, by this confusion is the ability of a judge to throw out any copyright infringement based on the [good faith fair use defense \[17 USC 504\(c\)\(2\)\]](#). If the educator has followed reasonable guidelines to what is or is not fair use the judge may choose to disregard any infringement by the educator and not award any damages. Following school or district guidelines is a good start; otherwise the individual educator will be responsible for the entire damage award.

The end result of my investigation into this area is a keen awareness of the personal liabilities a teacher may have if copyright guidelines are not followed. Educators have reasonable latitude to work with but do not have blanket authority to use whatever, whenever in the classroom or especially on the web.

There is generally much more latitude in a classroom where face-to-face instruction takes place than in asynchronous learning environments where materials are posted over a length of time. Educators should not use extensive amounts of others work in a class or presentation without proper permission. Most educators will use parts or sections of existing work in the creation of a new and unique work for the classroom or other instruction and this fits nicely into the realm of fair use.

On the other hand, moving from the realm of education into a commercial setting is much more difficult and wrought with risk and regulations. It seems difficult enough to discern the fair use for education without adding capital gain to the picture. Add to the mix the Internet and all of its questions and the whole issue is clouded once more.

I wish it was easier to determine the legalities of these issues and I am sure most experts do too. It isn't going to get easier in the foreseeable future so we are stuck with rules that are both subject to interpretation and changing. Educators need to be aware of the rules and guidelines as a matter of self-protection but there remains a great wealth of materials and information available to the classroom educator and is certainly worth the effort to use some of it in our own areas and classrooms.

**Sources:**

For a tutorial-like run down of all these issues, please visit the University of Texas web page <http://www.utsystem.edu/OGC/IntellectualProperty/cprtindx.htm> . Georgia Harper has done an excellent job of covering all these issues and more in a well-organized site.

“Who Owns the Copyright?”

Demystifying Ownership in Employment Situations by Ronald D. Jackson, Esq.

[www.rdjlaw.com/copyright1.htm](http://www.rdjlaw.com/copyright1.htm)

“Digital Millennium Copyright Act”

Jonathan Band

Morrison and Forester LLP

Washington DC

[www.arl.org/info/frn/copy/band.html](http://www.arl.org/info/frn/copy/band.html)

“Judicial Response: A Safe Harbor in “Fair Use” Doctrine”

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Indexed by date (February 2 1998) at Intellectual Property and Technology Forum,  
Boston College Law School

[www.bc.edu/bc\\_org/avp/law/st\\_org/iprf/articles/index.html](http://www.bc.edu/bc_org/avp/law/st_org/iprf/articles/index.html)